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March 8, 2018

By Email

Mr. Erik Baptist
Senior Deputy General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Mail code: 2310A

Dear Mr. Baptist:

I write on behalf of the American Home Furnishings Alliance, Inc., Composite Panel Association, the International Wood Products Association, Kitchen Cabinet Manufacturers Association, the National Association of Home Builders, and the Window and Door Manufacturers Association (collectively the “Associations”).

The Associations collectively represent hundreds of thousands of businesses that comprise the composite wood product supply chain. Our member companies employ millions and are spread across every state in the nation.

We have been actively involved in assisting the U.S. Environmental Protection Agency’s (“EPA’s”) defense of Sierra Club’s challenge to the compliance extension for the emissions standards in the Formaldehyde Rule. *See Sierra Club v. Pruitt*, No. 4:17-cv-6293-JSW (N.D. Cal.). Our member companies relied in good faith on that compliance extension, which was intended to provide an orderly path toward a December 12, 2018 compliance deadline.

As you know, the Court recently vacated the compliance extension. That vacatur risks disrupting the composite wood supply chain, putting at risk billions of dollars of inventory and thousands of jobs. Although the Court temporarily stayed the vacatur, it set a deadline of **tomorrow at 7:00 pm Eastern time** for a joint submission addressing the vacatur or further briefing from the parties.

The Associations have appreciated working with your staff, particularly, Mr. Steve Anderson, as well as Ms. Leslie Hill at the U.S. Department of Justice (“DOJ”), on a Joint Stipulation to file on March 9 in response to the Court’s Order. We have also conferred with counsel for the Plaintiffs, Sierra Club and A Community Voice-Louisiana, on the key principles that would be appropriate for the Joint Stipulation.

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One of the critical terms of the Joint Stipulation would allow industry to comply with the California Air Resources Board's ("CARB's") formaldehyde certification during an interim period through March 22, 2019.¹ This is *not* a judicially imposed term; nor is it a request for the Judge to re-write the Formaldehyde Rule.

Instead, the Associations respectfully request that the Joint Stipulation reflect a plain language interpretation of an existing provision of the Formaldehyde Rule, the CARB Reciprocity regulation. That regulation provides that:

If a product is certified by a CARB approved TPC [third-party certifier] that is also recognized by EPA, the product will also be considered certified under TSCA Title VI until March 22, 2019 after which the TPC needs to comply with all the requirements of this part as an EPA TSCA Title VI TPC under Section 770.7(d) in order for the product to remain certified.

40 C.F.R. § 770.15(e) (emphasis added).

Consistent with the language of the regulation, the Joint Stipulation would allow a CARB compliant product to be recognized as compliant under EPA's Formaldehyde Rule through March 22, 2019. This principle is supported not only by the Associations, but Plaintiffs as well.

Nonetheless, we understand that EPA may have concerns that the Joint Stipulation reflects a "re-interpretation" of the CARB Reciprocity regulation that may create litigation risk. We trust that sharing our perspective may alleviate those concerns.

The Joint Stipulation does not require EPA to formally reinterpret a regulation. We understand that EPA staff may have previously taken a more narrow view of the CARB Reciprocity regulation during informal discussions with the regulated community. However, informal verbal discussions are not official interpretations that bind the agency. *See, e.g., C.J.L.G. v. Sessions*, 880 F.3d 1122, 1149 n.19 (9th Cir. 2018) ("We accord no deference to an agency's unofficial, non-binding statements of policy that are unmoored from any interpretation of the governing statute or its regulations."). Nor does the single passing reference to CARB reciprocity in the preamble to a recent rule² overcome the plain text of the regulation. *See, e.g.,*

¹The emission standards of the CARB rule and the EPA rule are identical; there are some minor nuances in other provisions that make this very important.

²82 Fed. Reg. at 44535, Col. 1 ("Additionally, this final action will extend the transitional period during which the CARB TPCs may certify composite wood products under TSCA Title VI without an accreditation issued by an EPA

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El Comite Para El Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1070 (9th Cir. 2008) (“[T]he preamble language should not be considered unless the regulation itself is ambiguous.”); *Wards Cove Packing Corp. v. Nat’l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002) (“[T]he plain meaning of a regulation governs and deference to an agency’s interpretation of its regulation is warranted only when the regulation’s language is ambiguous”).

The U.S. Supreme Court recently clarified that an agency’s change in a regulatory interpretation does not trigger an obligation to undergo notice-and-comment rulemaking procedures under the Administrative Procedure Act (APA). *Perez v. Mortgage Bankers Association* abrogated longstanding D.C. Circuit precedent that required an agency to use “APA’s notice-and-comment procedures when it wishe[d] to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted.”³ Thus, *Perez* shows that the interpretation of the CARB Reciprocity regulation stands on firm procedural footing, even if it were to be considered to be a “re-interpretation.”⁴

The interpretation of the CARB Reciprocity rule is one supported by Plaintiffs Sierra Club, and A Community Voice – Louisiana, and the Associations. While not dispositive in the agency’s decision-making, it is a relevant factor in assessing the practical risk of litigation. How often do Sierra Club and six trade associations agree on an interpretation of an EPA regulation? That unique circumstance reflects a broad stakeholder consensus that ought to be reflected in agency policy.

Even if a third-party wished to challenge the proffered interpretation of the CARB Reciprocity regulation, no one would have legal standing to do so. There is no environmental

TSCA Title VI Accreditation Body so long as the TPC remains approved by CARB, is recognized by EPA and complies with all aspects of the December 12, 2016, final rule until March 22, 2019.”).

³*Perez v. Mortgage Bankers Assoc.*, 575 U.S. ____ (2015) (“When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. §553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.”).

⁴An agency’s expression of a regulatory interpretation in a pleading, such as the Joint Stipulation, is not unusual. For example, the U.S. Supreme Court has deferred to NHTSA’s interpretation of the Motor Vehicle Safety Act offered in an amicus brief. See *Geir v. American Honda Motor Company, Inc.*, 529 U.S. 861, 883 (2000).

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or public health impact from EPA's interpretation. As EPA has acknowledged, "[t]he formaldehyde emission standards for composite wood products under the EPA final rule, and set by Congress, are identical to the California 'Phase 2' formaldehyde emission standards."⁵ No injury-in-fact therefore flows from the interpretation of the CARB Reciprocity regulation.

The consequences of the Court lifting the stay are severe and pervasive. We have shared declarations from the Associations explaining that the Court's vacatur puts in jeopardy thousands of jobs for producers, importers and manufacturers of composite wood products, as well as downstream industries such as homebuilding, furniture making and cabinet manufacturing. The Joint Stipulation avoids that risk.

Time is of the essence. In order to meet the Court's deadline tomorrow, we need to be able to share a draft of the Joint Stipulation as soon as possible with Sierra Club's counsel. To that end, please feel free to reach out with any questions or concerns at (202) 669-6608. We appreciate EPA's consideration of our position and its importance to avoiding a major supply chain disruption.

Sincerely,

/s/ Justin Savage

Justin A. Savage

⁵EPA, Consumer Frequently Asked Questions on the Formaldehyde Standards for Composite Wood Products Act, available at <https://www.epa.gov/formaldehyde/consumer-frequently-asked-questions-formaldehyde-standards-composite-wood-products-act>